

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: June 30, 2005

Resolution No. L-319

RESOLUTION

**RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION
CONSUMER SERVICES DIVISION (UTILITIES SAFETY BRANCH)
INVESTIGATION RECORDS PURSUANT TO SUBPOENAS BY JACK R.
REINHOLTZ AND NICHOLAS PAULOS ON BEHALF OF
MIRAMONTES CONSTRUCTION SEEKING DISCLOSURE OF
COMMISSION STAFF INVESTIGATION RECORDS RELATING TO A
SEPTEMBER 5, 2003 ACCIDENT INVOLVING THE FACILITIES OF
SOUTHERN CALIFORNIA GAS COMPANY IN THE CITY OF SANTA
MONICA, CALIFORNIA. (INCIDENT NO. G20030905-01.)**

BACKGROUND

Jack R. Reinholtz and Nicholas Paulos of the law firm of Prindle, Decker & Amaro LLP, representing Miramontes Construction Company, Inc. (Miramontes Construction), subpoenaed records of the California Public Utilities Commission (Commission) relating to the agency's investigation of an incident that occurred on September 5, 2003, when an employee of Miramontes Construction installing a sewer line for the City of Santa Monica hit and damaged a Southern California Gas Company service line. Gas migrated to a nearby apartment building and caused an explosion and interruption of service to five customers. No fatalities or injuries were reported. In addition to incident investigation records, the subpoenas seek the appearance of Commission employee Steve Antabli (Mahmoud Intably) at a July 14, 2005 deposition concerning the Commission's investigation of this accident.

On May 31, 2005, Commission staff responded to the subpoenas with a letter informing the subpoenaing law firm that, although Commission staff has completed its investigation, staff could not disclose the investigative record in the absence of authorization by the Commission. General Order (G.O.) 66-C, the Commission's guidelines for public access to Commission records, provides in § 1.1 that Commission records are public, except "as otherwise excluded by this General Order, statute, or other order, decision, or rule." G.O. 66-C § 2.2 precludes staff's disclosure of "[r]ecords or information of a confidential nature furnished to or obtained by the Commission ... including: (a) Records of investigations and audits made by the Commission, except to

the extent disclosed at a hearing or by formal Commission action.” Section 2.2 (a) covers confidential information provided by Southern California Gas Company to Commission staff in the course of staff’s investigation, as well as Commission generated records containing this information.

Although G.O. 66-C § 2.2(a) requires staff to deny most initial requests seeking Commission investigation records, and to object to subpoenas seeking such records until the Commission has authorized disclosure, § 3.4 of the G.O. permits those denied access to appeal to the Commission for disclosure. Subpoenas implicitly include such an appeal. This resolution constitutes the Commission’s response to the subpoenas served on behalf of Miramontes Construction.

DISCUSSION

The Code of Civil Procedure provides broad discovery rights to those engaged in litigation. Unless limited by an order of the court, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Code of Civil Procedure § 2017 (a).)

Evidence Code § 911 provides that: “Except as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness. (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing. (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object or other thing.” Thus, as a general rule, where state evidence law applies, a government agency’s justification for withholding records in response to a subpoena must be based upon a statutory prohibition, privilege, or other protection against disclosure.

There is no statute prohibiting disclosure of the Commission’s incident investigation records. However, some documents, or portions of documents, within an investigation file may be subject to one or more of the following privileges or protections against disclosure: attorney work product protection (Code of Civil Procedure § 2018); lawyer client privilege (Evidence Code § 950 et seq.); official information privilege (Evidence Code § 1040); or trade secret privilege (Evidence Code § 1060). Further, portions of investigation records may be subject to disclosure limitations in the Information Practices Act (IPA) (Civil Code § 1798 et seq.).

During the past twelve years the Commission has ordered disclosure of records concerning completed incident investigations on numerous occasions. The Commission has found that disclosure of such records will not interfere with the Commission’s investigations, and may lead to discovery of admissible evidence and aid in the resolution

of litigation regarding the incident.¹ Most of these resolutions responded to disclosure requests and/or subpoenas from individuals involved in electric or gas incidents, the families of such individuals, the legal representatives of such individuals or families, or the legal representatives of a defendant, or potential defendant, in litigation related to an incident. Disclosure resolutions usually note that Public Utilities Code § 315, which expressly prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, “as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property,” offers utilities sufficient protection against injury caused by the release of investigation records.

Viewing the current subpoenas for records and testimony within the context of these laws and policies, we note that Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records will not interfere with staff’s ability to complete its incident investigation responsibilities.

The only personal information in the records subpoenaed here consists of references to the identity of the owners of property affected by the incident, the identity of Commission staff and other government employees investigating the incident, and the identity of regulated entity employees reporting the incident. The service of the deposition subpoena upon the Commission, and of the notice of deposition and request for production of documents upon the parties to the litigation regarding the incident, provided notice to individuals involved with the incident and/or its investigation that records that may include personal information have been requested.

No information in the incident investigation file requires our assertion of a privilege against disclosure with one exception. The United States Department of Transportation Research and Special Programs Administration, Office of Pipeline Safety, Western Region provided the Commission with National Response Center (NRC) Incident Report # 656030, which is identified by the NRC as for government use only, not to be released to the public without permission of the NRC. This report is subject to the Evidence Code § 1040 official information privilege, and will not be disclosed in response to the subpoenas.

The report identified as confidential by the NRC was acquired in confidence by Commission staff in the course of its duties, and has not been open or officially disclosed to the public; thus, the report is official information within the meaning of Evidence Code § 1040 (a). The public interest clearly favors cooperation between governmental agencies. Disclosure by the Commission of information acquired from and identified as confidential by another governmental agency may have an adverse impact on the working

¹ See, e.g. Commission Resolution L-240 *Re San Diego Gas & Electric Company*, rehearing denied in D.90-05-020 (1993), 49 CPUC 2d 241.

relationship between the Commission and other governmental agencies, and thus is not in the public interest. Because there is a need to maintain the confidentiality of this information that outweighs the necessity for disclosure in the interest of justice, the report is subject to the conditional official information privilege in Evidence Code § 1040 (b)(2). The subpoenaing party is free to request information regarding Incident Report # 656030 directly from the NRC at 1-800-424-8802.

We strongly discourage litigants from seeking the testimony of Commission employees regarding incident investigations. The provision of such testimony at depositions or trials often greatly interferes with staff's vital work conducting safety inspections and incident investigations, and thus with the Commission's efficient implementation of its regulatory responsibilities, since staff must adjust normal workload to accommodate the often changing schedule of a subpoenaed appearance. Further, litigants frequently inappropriately seek staff testimony regarding legal issues and Commission policy determinations beyond the scope of their knowledge or authority. In most situations, Commission incident investigation records speak for themselves, and staff has little useful or appropriate to add. Efforts to extract from staff more than those employees can provide wastes the time of both staff and the litigants themselves.

We recognize, however, that sometimes it may be necessary for a Commission employee to be a witness in connection with a matter, event, or transaction concerning which he or she has expertise gained in the course of his or her duties, where a subpoena is properly served upon the employee pursuant to Government Code § 68097.1 and witness fees and travel expenses paid in accord with Government Code § 68097.2.

We strongly encourage the subpoenaing party to review the records we disclose and reconsider whether they consider the deposition scheduled for July 14, 2005 necessary in light of the very straightforward conclusion reached by staff investigating this incident.

With the exception of the information identified above as confidential, we authorize disclosure of the Commission's records regarding its investigation of Incident G20030905-01.

COMMENTS ON DRAFT RESOLUTION

Public Utilities Code § 311 (g)(1) generally requires that proposed resolutions be served on all parties and subject to at least 30 days public review and comment before the Commission may vote on them. Section 311 (g)(3) and Rule 77.7 (f)(7) of the Commission's Rules of Practice and Procedure provide that the Commission may reduce or waive the period for public review and comment regarding decisions authorizing disclosure of documents in the Commission's possession when such disclosure is pursuant to subpoena. The comment period is being waived under this authority.

FINDINGS OF FACT

1. The Commission received two subpoenas from the law firm of Prindle, Decker & Amaro LLP, representing Miramontes Construction, seeking Commission staff records, and the testimony of staff, concerning the investigation of an incident that occurred on September 5, 2003, when an employee of Miramontes Construction installing a sewer line for the City of Santa Monica hit and damaged a Southern California Gas Company service line.
2. Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records will not interfere with staff's ability to complete its incident investigation responsibilities.
3. The subpoenaed records includes personal information in the form of references to the identity of the owners of property affected by the incident, the identity of Commission staff and other government employees involved in investigating the incident, and the identity of regulated entity employees involved in reporting the incident.
4. The service of the deposition subpoena upon the Commission, and of the notice of deposition and request for the production of documents upon the parties to the litigation regarding the incident, provides individuals involved with the incident and/or its investigation with notice of the subpoena for records that include identifying personal information.
5. The United States Department of Transportation Research and Special Programs Administration, Office of Pipeline Safety, Western Region, provided the Commission with a copy of National Response Center (NRC) Incident Report # 656030, which is identified by the NRC as for government use only, not to be released to the public without permission of the NRC.
6. The public interest favors disclosure of the requested investigation records, with the exception of NRC Incident Report # 656030. This report was acquired in confidence by Commission staff and has not been open, or officially disclosed, to the public.
7. The public interest favors cooperation between governmental agencies. Disclosure by the Commission of information obtained from and identified as confidential by another governmental agency may have an adverse impact on the working relationship between the Commission and other governmental agencies, and thus is not in the public interest.

CONCLUSIONS OF LAW

1. Where state evidence laws apply, a government agency's justification for withholding a public record in response to a subpoena or other discovery procedure must generally be based upon a statutory prohibition, privilege, or other protection against disclosure. (Evidence Code § 911.)
2. The Commission has through G.O. 66-C § 2.2 (a) limited staff disclosure of investigation records in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. G.O. 66-C does not limit the Commission's ability to order disclosure of records.
3. NCR Incident Report # 656030, identified by the NRC as for government use only, not to be released to the public without permission of the NRC, is subject to the Evidence Code § 1040 official information privilege, and should not be disclosed in response to the subpoenas.
4. With the exception of the report identified above as subject to the Evidence Code § 1040 official information privilege, the public interest in nondisclosure of records concerning Incident G20030905-01 does not outweigh the necessity for disclosure in the interest of justice; thus, incident records not subject to the official information privilege should be disclosed.

ORDER

1. The Commission's records concerning the investigation of an incident that occurred on September 5, 2003 when an employee of Miramontes Construction was installing a sewer line for the City of Santa Monica and contacted an underground service line of Southern California Gas Company shall be disclosed in response to the subpoenas served on behalf of Miramontes Construction, with the exception of United States Department of Transportation Research and Special Programs Administration, Office of Pipeline Safety, National Response Center (NRC) Incident Report # 656030.
2. The effective date of this order is today.

I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting of June 30, 2005 and that the following Commissioners approved it:

STEPHEN LARSON
Executive Director

